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No. 06-1575

In the Supreme Court of the United States

CITY OF BRIDGEPORT, JEREMY DEPIETRO, OFFICER, AND CHRISTOPHER BORONA, DETECTIVE,

Petitioners,

v.

CHRISTOPHER RUSSO

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining that respondent is entitled to a trial on the claim that his 217-day imprisonment based on mistaken identification, accompanied by petitioners' concealment of exculpatory information, violated his constitutional rights.

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STATEMENT

Christopher Russo was mistakenly arrested for robbery and incarcerated for 217 days before the mistake was acknowledged and he was released. The court of appeals unanimously determined that the evidence in the summary judgment record would allow a jury to find that one of the petitioners "actively hid the exculpatory evidence" and was "deliberate[ly] indifferen[t] to Russo's incarceration and to his asserted innocence" (Pet. App. 22a) and that the other individual petitioner similarly engaged in "either intentional violation of, or deliberate indifference to, Russo's constitutional rights" (*ibid.*). The court therefore concluded that the district court erred in granting summary judgment in petitioners' favor, and held that Russo is entitled to a trial on his claim under 42 U.S.C. § 1983 that his prolonged detention violated his constitutional rights and on the facts relating to the individual petitioners' qualified immunity defense.

The certiorari petition targets only one discrete aspect of the court of appeals' ruling. The petition does not seek review of the court of appeals' determination that the individual petitioners were not entitled to qualified immunity on the basis of the summary judgment record before the district court. And it does not seek review of the court of appeals' reversal of summary judgment with respect to the City of Bridgeport. The only issue presented for review is whether the lower court erred in determining that the summary judgment record entitled respondent to a trial on his claim of a constitutional violation.

That interlocutory fact-bound ruling presents no question warranting this Court's attention. There is no conflict among the courts of appeals, the ruling below is consistent with this Court's precedent, and the Second Circuit's decision does not unsettle the law or impose a new duty to investigate on police officers. To the contrary, even petitioners themselves acknowledge (at 11-12) that the decision below is consistent with decisions of other courts of appeals dating back to 1993.

At bottom, petitioners' claim is that the court of appeals erred in its assessment of the summary judgment record: that the information available to the officers was not sufficiently exculpatory and that "the officers did nothing to hide or conceal the existence of" exculpatory evidence. Pet. 14, 15. Those determinations plainly do not merit this Court's attention. The petition should be denied.

1. The Robbery and Mistaken Arrest. On August 1, 2002, an Amoco gas station located in Bridgeport, Connecticut was robbed by an individual the cashier described as "a white male in his late 30s, between 5'6" and 5'8" tall, of medium build with a very short, blond crew cut." Pet. App. 2a. The store's surveillance camera captured the robbery. The police officers froze still photos of the perpetrator from the videotape, matched them against a photo database, and generated eight possible "hits." *Id.* at 3a, 123a-124a. One was a photo of respondent Christopher Russo. The officers showed the store clerk the photographs, which depicted only the faces of eight individuals, and the clerk identified Russo as the culprit to a "one hundred percent" certainty. *Id.* at 3a & n.1. The officers obtained a warrant, arrested Russo, and charged him with the robbery.

The evidence demonstrated that at the time of the robbery, Russo had extensive tattoos on his arms. The court of appeals stated that "[i]n addition to the distinctiveness of his tattoos, Russo's physical characteristics were different in important respects from those of the Amoco robber, as described by the cashier." Pet. App. 4a. Russo was 27 years old, six feet tall, and had brown hair but was balding. "He was, therefore, younger, taller, balder, and with different colored hair than the person whom the victim had described to the police." *Ibid.*

Officers DePietro and Borona interrogated Russo following his arrest. They informed Russo that the robbery had been recorded and advised him that " [i]f you play ball, we'll try to get you three years from the prosecutor, and if you

don't, you'll probably end up with around eight years." Pet. App. 173a. Russo immediately asked whether the videotape showed a robber with body tattoos. *Id.* at 172a-173a. He explained: "[B]eing into tattoos the way I am, the first thing about me that makes me original is my tattoos." *Id.* at 173a. DePietro and Borona "left the interrogation room and returned a while later holding a magnifying glass and a ruler. They then informed Russo that the videotape showed a perpetrator with tattoos." *Id.* at 5a.

The questioning continued. Knowing that Russo was suffering from heroin withdrawal, the officers told him that they would take him to the hospital for methadone if he confessed. Pet. App. 174-75a. Russo continued to maintain his innocence. He remained in jail for seven months until the charges against him finally were dismissed. *Id.* at 4a-7a.

On November 19, 2002, more than three months after Russo's arrest, an investigator for the state prosecutor "visited the Bridgeport Police Department property room to obtain the videotape. The investigator found that the tape was missing. Sometime after November 25, 2002, the investigator obtained the tape from Officer DePietro, who had it locked in the drawer of his desk." Pet. App. 6a. The investigator obtained a laboratory enhancement of the tape on January 22, 2003.

Russo's attorney had sought production of the tape on November 1, 2002. Sometime between January and April 2003, he was permitted to view the tape and "[i]mmediately thereafter, he told the state investigator that the person on the tape could not be his client." Pet. App. 7a.

"Finally, on April 22, 2003, due to defense counsel's 'insistence' on Russo's innocence, the prosecutor actually watched the videotape. The following day, after checking with a probation officer to verify that Russo's tattoos predated the crime," the State requested dismissal of the prosecution. Pet. App. 7a. The prosecutor stated in court that

"'"[t]he videotape shows both sides of the perpetrator's left [arm] and one side of the forearm, and one side of the perpetrator's right forearm. And there very clearly are no tattoos on any of those.'" *Ibid.* (citation omitted). The court dismissed the charges against Russo.

2. The District Court Proceedings. Russo filed suit in state court under 42 U.S.C. § 1983 against the City of Bridgeport, Officer DePietro, and three other police officers. He alleged constitutional violations arising out of his arrest and lengthy detention, claiming that defendants "lacked probable cause for [his] arrest, demonstrated reckless and malicious indifference to [his] claims of innocence, and failed to meet their statutory obligation under Connecticut law to disclose exculpatory evidence." Pet. App. 8a. The complaint also alleged state law claims for false arrest, false imprisonment, negligent infliction of emotional distress, and intentional infliction of emotional distress.

Defendants removed the case to the United States District Court for the District of Connecticut. The district court granted summary judgment for defendants, holding that the officers' conduct did not violate the Constitution. Pet. App. 72a. The court stated that the evidence was insufficient to show that the tattoos on the videotape were legible enough to exonerate Russo prior to the tape's enhancement in January, 2003. *Id.* at 66a-67a.

3. The Second Circuit Decision. The court of appeals unanimously affirmed in part and reversed in part. Pet. App. 11a-27a. It upheld the district court's dismissal of Russo's claims based on his initial arrest because the officers had probable cause to arrest him based upon the cashier's identification of his photograph. *Id.* at 10a-12a.

With respect to the claim based on Russo's lengthy detention, the court stated that the evidence in the summary judgment record was sufficient to preclude judgment for the defendants because of the length of Russo's incarceration,

the ease with which the exculpatory evidence could have been checked, and "the alleged intentionality of [the individual petitioners'] behavior." Pet. App. 20a.

The court observed that "[t]he total 217-day detention here, or even the 68-day detention between Russo's arrest and DePietro's yielding of the tape to the prosecutor, plainly was prolonged rather than short and carried constitutional implications." Pet. App. 20a. The videotape was "an easily available piece of physical evidence" already in the officers' possession. *Id.* at 21a. Finally, "a reasonable jury could find that DePietro actively hid the exculpatory evidence." *Id.* at 22a. Also, the actions of DePietro and Officer Borona in "falsely describing the content of the videotape" and failing to investigate it to see if it was exculpatory "would readily support a jury finding of either intentional violation of, or deliberate indifference to, Russo's constitutional rights." *Ibid.* "DePietro's failure to follow police procedures with respect to the storage of the exculpatory evidence adds further evidence on the basis of which a jury could find deliberate indifference to Russo's incarceration and to his asserted innocence." *Ibid.*[1]

The court of appeals upheld the district court's grant of summary judgment in favor of the two other police officers. Pet. App. 23a-24a. It held that there was no evidence that these officers were on notice of Russo's claim of innocence based on his tattoos.[2]

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[1] The court of appeals pointed out that the district court's contrary determination rested in part on "speculation" that was "inappropriate on a motion for summary judgment." Pet. App. 4a n.3.

[2] The court of appeals also held that Officers DePietro and Borona were not entitled to qualified immunity as a matter of law because factual disputes precluded such a determination. Pet. App. 25a-26a. The court also reversed the district court's grant of summary judgment in favor the City of Bridgeport because the city had admitted that "'all individual defendants . . . acted toward the Plain-

ARGUMENT

Review by this Court of the court of appeals' interlocutory ruling plainly is not warranted. The court of appeals decided only that the district court erred in granting summary judgment. The case has been remanded for trial, at which the individual petitioners could well prevail either on the merits or on their claim of qualified immunity.

Moreover, as the court of appeals held and the other lower court rulings addressing similar claims confirm, this is an area of the law in which decisions are heavily fact-dependent. The differing results in the courts of appeals rest entirely on differences in the facts of the cases, not on disagreements about the applicable legal standard. There is no conflict among the lower courts.

The decision below also is entirely consistent with this Court's ruling in *Baker* v. *McCollan*, 443 U.S. 137 (1979). The Court there rejected the plaintiff's claim that his detention over a three-day holiday weekend violated the Constitution because the police officers did not investigate his claim of innocence until after the weekend was over. It indicated, however, that lengthy detention in the face of protestations of innocence could in particularly egregious circumstances violate the Constitution. The court of appeals correctly determined that the facts here are not sufficiently clear to establish the absence of such a violation as a matter of law.

Finally, petitioners are wrong in asserting that the court of appeals' decision threatens police officers with novel burdens that will hinder law enforcement. To the contrary, the

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tiff in accordance with custom, policy and practice.'" *Id.* at 26a (citation omitted). "We understand this to constitute an admission," the court ruled, "that, if officers DePietro and Borona are ultimately held to have violated Russo's constitutional rights, then municipal liability against the City will be appropriate as well." *Ibid.* The petition does not challenge these determinations and we therefore do not address them.

ruling below is wholly consistent with decisions rendered by other courts over the past fifteen years and petitioners have not shown that those decisions have given rise to a flood of litigation warranting this Court's intervention, especially in view of the interlocutory, fact-bound character of the decision below.

A. There Is No Conflict Among the Courts of Appeals.

Petitioner acknowledges (Pet. 11-12) that the decision below is consistent with rulings by the Fifth, Eleventh, and Ninth Circuits. See *Fairley* v. *Luman*, 281 F.3d 913 (9th Cir. 2002); *Cannon* v. *Macon County*, 1 F.3d 1558 (11th 1993); *Sanders* v. *English*, 950 F.2d 1152 (5th Cir. 1992); see also *Kennell* v. *Gates*, 215 F.3d 825 (8th Cir. 2000) (adopting same standard). These cases share each of the three key characteristics relied upon by the court of appeals in the present case.

First, the courts stressed that the plaintiffs had been detained for more than a few days. Although Russo's detention is by far the longest, the plaintiff in the Fifth Circuit case was incarcerated for fifty days. *Sanders*, 950 F.2d at 1158. The plaintiffs in the other cases were confined for twelve, four and six days, respectively. See *Fairley*, 281 F.3d at 915; *Cannon*, 1 F.3d at 1560-61; *Kennell*, 215 F.3d at 827.

Second, the exculpatory evidence was already in the hands of the police officers, just like the videotape here. In *Sanders*, which involved a series of robberies, several witnesses told the officer that the plaintiff was not the perpetrator and three other witnesses provided the plaintiff with an alibi for one of the robberies. 950 F.2d at 1162. In *Cannon*, the officer ignored the mismatch between the plaintiff's social security number (which was on her driver's license) and the social security number on the arrest warrant. 1 F.3d at 1560. In *Fairley*, the officers refused to check an available fingerprint database that would have confirmed that they had

mistakenly arrested the identical twin of the person named in the arrest warrant. 281 F.3d at 915. In *Kennell*, a fingerprint check demonstrated that the wrong person was in custody. 215 F.3d at 827.

Third, the evidence supported an inference that the officer's refusal reflected a deliberate decision to ignore the potentially exculpatory evidence, as the court of appeals concluded here. In *Cannon*, the officer had the plaintiff's driver's license, but recited in his arrest report the social security number from the arrest warrant. 1 F.3d at 1560. In *Sanders*, the police officer knew of but ignored the exculpatory evidence, in part because of the favorable publicity he had received in connection with arresting the plaintiff. 950 F.2d at 1162. In *Fairley*, the fingerprint database was readily available. 281 F.3d at 915 & n.1. And in *Kennell*, the court found sufficient evidence to support the jury's determination that the officer deliberately ignored the exculpatory evidence. 215 F.3d at 830.

Petitioner's allegedly conflicting decisions share none of these essential characteristics. In two of the cases—*Ahlers* v. *Schebil*, 188 F.3d 365 (6th Cir. 1999), and *Eversole* v. *Steele*, 59 F.3d 710 (7th Cir. 1995)—the plaintiffs were arrested and released and did not assert claims based on post-arrest detention. Indeed, such a claim would have been precluded by this Court's decision in *Baker*.[3] These cases simply do not address claims that in any way resemble the one in this case.

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[3] Petitioner points (Pet. 14) to language in these opinions stating that there is no duty to investigate further once probable cause is established. But those statements were made in factual situations in which the plaintiff could not assert a claim based on a lengthy detention. They therefore provide no indication of how those courts would rule in cases presenting facts such as those addressed by the court below and the Fifth, Eleventh, Eighth, and Ninth Circuits.

Petitioners' remaining decision—*Brady* v. *Dill*, 187 F.3d 104 (1st Cir. 1999)—is similarly inapposite. It involves a detention of *36 hours*. Moreover, there was no evidence of deliberate disregard by the officers of exculpatory evidence; to the contrary the court commented on the diligence of the officers.

In that case, an individual cited for drunk driving—David Buckley—"palmed himself off" as William Brady, providing an accurate address, date of birth, and social security number. 187 F.3d at 106. When Buckley later failed to appear in court, a warrant was issued in Brady's name, and Brady was arrested. Brady steadfastly maintained his innocence, and the police began investigating his claims. They discovered differences between the original arrest report and the new one. "Report No. 1 indicated that Brady had a tattoo and that his mother's maiden name was 'Kowalski,' whereas Report No. 2 noted no tattoos and listed the detainee's mother's maiden name as 'Kozloski.'" *Id.* at 107. The physical descriptions in the two reports also "did not correlate precisely." *Ibid.* After contacting the trooper who had originally arrested Buckley, the officers began to suspect a mistake, and tried to get him released. *Id.* at 106-07.

The First Circuit found no constitutional violation, noting that the initial arrest was supported by probable cause and that "the troopers went to great pains to gather information bearing on [Brady's] situation, tried to assist in securing his prompt release, and arraigned him before an impartial magistrate at the earliest opportunity." 187 F.3d at 109. Comparing Brady's thirty-six hour confinement to the three day detention in *Baker*, the court concluded that "it would take circumstances much more egregious than Brady's for us to conclude that a weekend detention of approximately thirty-six hours, accompanied by a concerted effort on the part of the police to secure the detainee's release, resulted in a wrong of constitutional dimensions." *Ibid.* The court noted, however, that it understood "*Baker* to leave open the possibility that

under extreme circumstances," a plaintiff may press a claim for prolonged detention. *Id.* at 115 "Depending upon factors such as the length of the detention, the behavior of the police, the source and quality of the information available to them, and the nature of the pretrial procedures afforded by local law, there may be circumstances so egregious as to ground a substantive due process claim." *Ibid.* Then, as examples of such beyond-the-pale conduct, the court cited a forty-one day detention and two thirty-day detentions. *Ibid.*

Brady is thus entirely consistent with the holding below. The short detention, and absence of evidence of deliberate misconduct distinguish the two decisions. And the First Circuit expressly recognized that facts such as those presented here would warrant the result reached by the court below. There simply is no conflict among the courts of appeals.

B. The Court Of Appeals' Holding Conforms To This Court's Precedent.

The Second Circuit's decision is fully consistent with this Court's jurisprudence. The holding below reaches only the most extreme deprivations of liberty: involving long incarcerations, readily available exculpatory evidence, and inexcusable conduct by police officers.

The Fourth Amendment prohibits "unreasonable searches and seizures" by state actors. U.S. Const. amend. IV. "By virtue of its 'incorporation' into the Fourteenth Amendment, the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty." *Baker* v. *McCollan*, 443 U.S. 137, 142-43 (1979) (citation omitted). So long as a judicial officer makes a probable cause determination "either before or promptly after arrest," there is generally no constitutional violation. *Gerstein v. Pugh*, 420 U.S. 103, 124 (1975).

In some situations, however, an extended detention initially supported by probable cause may eventually give rise

to a constitutional violation. This Court has stated that an individual arrested on probable cause "[o]bviously * * * could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment." *Baker*, 443 U.S. at 144.

In *Baker*, Leonard McCollan "somehow procured a duplicate of [his brother Linnie's] driver's license, identical to the original in every respect except that . . . 'Leonard's picture graced it instead of Linnie's.'" 443 U.S. at 140 (citation omitted). When he was arrested on narcotics charges, Leonard posed as his brother, signing various forms with Linnie's name. After the imposter was released from custody, an arrest warrant was issued in Linnie's name. The innocent brother was stopped for running a red light and then hauled off to jail "over his protests of mistaken identification." *Id.* at 141. The officers compared Linnie's information with the data from Leonard's original arrest, and "understandably concluded that they had their man." *Ibid.* After three days spanning a holiday weekend passed, "officials compared [Linnie's] appearance against a file photograph of the wanted man and, recognizing their error, released him." *Ibid.*

Linnie brought suit under Section 1983 against the county sheriff (Baker), alleging false imprisonment. Linnie argued that Baker should have instituted an "identification procedure that would have disclosed the error." *Id.* at 141-42. This Court rejected Linnie's claim, holding that the initial arrest was supported by probable cause and that a mere three-day detention over a holiday weekend does not constitute a wrong of constitutional dimensions. The Court emphasized, however, that an initial probable cause determination does *not* necessarily absolve police officers from responsibility for mistaken arrests. Rather, whether a mistaken detention violates the Constitution is a fact-bound inquiry focusing on the length of the detention and the availability of the exculpatory evidence. *See Baker*, 443 U.S. at 145 (as-

suming arguendo that "mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.'") But this Court was "quite certain that a detention of three days over a New Year's weekend does not and could not amount" to a constitutional violation. *Ibid.*

The facts here are entirely different. Russo spent 217 days behind bars, more than seventy-two times longer than Linnie McCollan. The officers in *Baker* listened to Leonard's claims of innocence, compared his appearance with a photograph of the wanted man, and arranged his release after three days. The court of appeals in the present case determined that a jury could conclude that the officers intentionally concealed an exculpatory videotape in a desk drawer and falsely told Russo that the videotape showed a robber with body tattoos. The lengthy detention and evidence of egregious police conduct in this case plainly supports the court of appeals' determination that Russo established facts sufficient to justify a trial on his claim of a constitutional violation.

C. "Public Policy" Considerations Do Not Justify Review By This Court.

Petitioners also contend that review is warranted because the decision below will impose on police officers "personal responsibility and a continuing duty to exhaustively investigate defenses brought to their attention by the suspect, and to monitor the detention status of the suspect at all times subsequent to their arrest and presentment to judicial officials." Pet. 4; see also *id.* at 17.

But the Second Circuit's decision plows no new ground. As we have discussed, four other courts of appeals reached the very same conclusion in decisions rendered over the last fifteen years without drastic adverse consequences for law enforcement. The requirements of lengthy detention, exculpatory information in the hands of the police, and proof of

deliberate misconduct restrict liability to truly egregious situations. That carefully limited remedy imposes no burden on law enforcement generally.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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